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No. 79-1774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD J. LOOK, *Petitioner,*

v.

COMMONWEALTH OF MASSACHUSETTS, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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REPLY BRIEF FOR PETITIONER

ERWIN N. GRISWOLD
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898

Attorney for Petitioner

Of Counsel:

KENNETH J. AYRES
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

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REPLY BRIEF FOR PETITIONER

I. PREJUDICE

The Brief in Opposition contains gross improprieties which are especially harmful in a case such as this, where the basic question is whether the conviction of the defendant below was obtained at a trial which was adequately free of prejudicial factors. The Commonwealth in its Brief notes and relies on testimony which was held inadmissible at trial, and also on a police report which was never introduced as substantive evidence at the trial. It is hard to understand the purpose of this except as an effort to prejudice this Court's consideration of the case.

First, at page 6 of the Brief in Opposition, the Commonwealth states as fact for the Court's consideration the following:

> During the treatment at the Look home, the emergency medical technicians learned from Susan

> Look that the shooting had followed an argument between Susan and the defendant (Tr. 3-25).

This is an egregious use of testimony which was excluded from evidence in this case. The medical technician's testimony was part of a *voir dire* hearing appearing in the transcript at vol. 3, pp. 22-35. The trial judge's ruling to exclude that testimony is unequivocally set forth at vol. 3, p. 35.

Then, at pages 25-26 of the Brief in Opposition, the Commonwealth quotes at length from a police report, evidently in a renewed attempt to influence this Court improperly. This police report was never in evidence in the court below. The quoted portion of the police report indicates that at some undisclosed time, the state police officers were informed by one of the medical technicians of an alleged argument between the petitioner and his wife. That report was submitted by defense counsel, but only for *voir dire* purposes and on a question of admissibility of evidence totally unrelated to the quoted excerpt from the report;[1] and it was marked by the trial court as "Voire [sic] Dire Exhibit No. 21" (Tr. vol. 5, p. 131). The contents of the police report were never submitted as evidence at the trial, and were never before the jury for its consideration.

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[1] The *voir dire* during which this police report was submitted concerned whether testimony by decedent's step-mother as to certain telephone conversations should be excluded because defense counsel had not been timely advised by the Commonwealth of the content of her proposed testimony. (Tr. vol. 5, pp. 112-131.) Defense counsel asked that the police report be marked only "as a voir dire exhibit as part of . . . [his] exception" to the trial court's ruling to admit certain parts of the step-mother's testimony. (Tr. vol. 5, p. 130).

Despite these two specious assertions of fact made by the Commonwealth in its Brief in Opposition, there is no evidence in the record whatsoever suggesting that Officers Carr and Masuret (who prepared the police report) spoke to the medical technician concerning the decedent's statement *prior* to entering the interrogation room at Wareham Police Station. (Tr. vol. 1, pp. 57-78, 112-141; vol. 3, pp. 106-156, 156-171; vol. 4, pp. 3-45; vol. 6, pp. 37-41.) There is not one iota of evidence to support the Commonwealth's baseless allegation that the state police officers had an independent untainted source for the "argument" information revealed to them through the surreptitious surveillance of petitioner's conversation with the Rochester police chief at the Wareham Police Station.

II. DENIAL OF A SPEEDY TRIAL

A. The Commonwealth contends that the failure of the court below to count the four-month period between petitioner's arrest and indictment as part of the delay relevant to petitioner's speedy trial claim, while in conflict with *Dillingham* v. *United States,* 423 U.S. 64, should be ignored. (Br. 15-16.) The reason offered is that the court found the post-indictment delay sufficient to "trigger" further inquiry, and weighed that delay "heavily" against the Commonwealth. This is unpersuasive in the face of the undoubted failure of the court below to apply this Court's decision in *Dillingham.* (Pet. App. C, 27a.)

As developed in the Petition, triggering further inquiry is but one function of length of delay under *Barker* v. *Wingo,* 407 U.S. 514. (Pet. 11.) *Dillingham* nowhere suggests that pre-indictment delay serves only a triggering role. Moreover, that the court below

may have deemed the post-indictment delay to weigh "heavily" in petitioner's favor does not mean, as the Commonwealth suggests, that proper consideration by the court of the four-month additional delay could not have made the delay "accure [sic] to the petitioner's benefit any more than it did." (Br. 16.) Under *Barker's* flexible *ad hoc* balancing test, the longer the delay the *more* heavily it is counted against the government. Thus, the length of delay in this case should have been weighed against the Commonwealth more severely than it was. Particularly in a speedy trial case as strong as this one—involving a four and one-half year delay and specific claims of serious prejudicial effects—it cannot reasonably be said with assurance that consideration of the additional four-month delay would not have tipped the scales in petitioner's favor.

B. The Commonwealth fails to meet petitioner's argument that the court below misapplied *Barker* v. *Wingo*. Rather, it says that petitioner "apparently" argues that the court below erred in imposing on him "the burden of proving prejudice." On this basis it contends that since petitioner does not argue for a shifting of burden of proof or an altering of *Barker* v. *Wingo's* balancing test, it is somehow "difficult to discern" petitioner's claim. (Br. 16-17.)

Petitioner's position, spelled out at pages 9-16 of the Petition, is quite clear, and more carefully honed. Petitioner's argument relates primarily not to who has the burden of proof regarding prejudice, but rather to what degree of proof is needed to meet that burden, how the length of the delay affects the degree of required proof or who bears the burden, and in what manner and to what extent the length of delay

may serve as presumptive evidence of prejudice. Petitioner contends that the utter failure of the court below to view the length of the delay as having any impact on the issue of prejudice was inconsistent with *Barker* v. *Wingo*. The petitioner further points out that these issues involving the interaction of the length of delay and the issue of prejudice are considerably unsettled, making this case appropriate for review by this Court.

C. The Commonwealth characterizes petitioner's allegations of prejudice from the four and one-half year delay as "speculative and insubstantial." (Br. 19.) This wholly ignores the fact that the delay caused the unavailability of petitioner's key witness on the quality of his marital relationship with the decedent, a subject which bore directly upon the main issue at trial: petitioner's motive.[2] It is insufficient to dismiss this claim of prejudice with a cavalier and unsubstantiated conclusion that the missing witness's testimony would have been merely cumulative. Similarly, petitioner's claim of prejudice due to failed memories as to the condition of the shotgun cannot be dismissed as readily as the Commonwealth would argue.

Barker v. *Wingo* makes clear not only that a delay may be "presumptively prejudicial," but that the "most serious" form of prejudice caused by delay is "the possibility that the defense will be impaired." 407 U.S. at 530, 532. *Barker* noted in particular the danger of prejudice due to witnesses becoming un-

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[2] This is starkly emphasized by the Commonwealth's improper use of excluded and non-admitted testimony to which reference is made at the beginning of this Brief.

available or losing memory. This Court said (407 U.S. at 532):

> If witnesses die or disappear during a delay, the prejudice *is obvious*. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record *because what has been forgotten can rarely be shown.* [Emphasis supplied.] [3]

Under *Barker*, petitioner's claims of witness unavailability and memory loss deserve more careful consideration than the Commonwealth suggests.

D. The Commonwealth's citations of authority at pages 22-23 of its Brief in Opposition are particularly unsuccessful in meeting petitioner's contentions. Thus, as authority for the proposition that the mere passage of time does not give rise to a presumption of prejudice, the Commonwealth cites only *United States* v. *DeLeo*, 422 F.2d 487, 494 (1st Cir. 1970), a case decided two years before this Court stated in *Barker* v. *Wingo* that delay alone could be "presumptively prejudicial." 407 U.S. at 530. All of the other cases cited are likewise readily distinguishable.

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[3] The Massachusetts court's reluctance to accept *Barker* on this point is apparent when the decision below is read in conjunction with *Commonwealth* v. *Rodriguez*, Mass. Adv. Sh. (1980) 1223, decided May 13, 1980. Although the court upheld in that case a dismissal for denial of a speedy trial, it stated its *unwillingness* to accept the finding of the trial court there that " 'lapse of time has probably dimmed the memory of witnesses who might be favorable to the defendant as well as the memory of prosecution witnesses concerning details that might be elicited on cross-examination which might be favorable to the defendant.' " Mass. Adv. Sh. (1980) at 1229.

III. ILLEGAL ELECTRONIC SURVEILLANCE

Since the petition was filed in this case, this Court has decided the case of *United States* v. *Henry,* No. 79-121, decided June 16, 1980. The *Henry* case involves elements which are relevant here, under the Sixth Amendment, as well as under the Fourth and Fifth Amendments. In considering the *Henry* case here, two facts must be recognized.

1. No question was raised below with respect to the Sixth Amendment. But, in this area of surreptitious interception of conversations, the questions under the Fourth, Fifth and Sixth Amendments are so closely interrelated that a question, squarely raised, about the propriety of an interception should be considered by this Court under any of the possibly applicable constitutional provisions. This is high-lighted by the fact that the reasoning used by the Court in the *Henry* case is applicable almost step by step to the facts of this case, as will be indicated below.

2. In *Henry* (and in *Spano* v. *New York,* 360 U.S. 315, and *Massiah* v. *United States,* 377 U.S. 201), the defendant had been indicted at the time the relevant facts occurred. Here, the petitioner had not been indicted when his conversation was intercepted. But he was under arrest. And the police investigation, under the circumstances "was no longer a general inquiry into an unsolved crime, but ha[d] begun to focus on a particular subject." *Escobedo* v. *Illinois,* 378 U.S. 478, 490. Here, of course, Look was always the only subject. He was the sole possible target in the case.

All of the reasoning applied by this Court in *Escobedo, Spano* and *Massiah* is equally applicable here. And the parallel between this case and *Henry* remains very close. In both *Spano* and *Massiah,* the accused had counsel at the time the police surveillance oc-

curred. Here, the accused did not have counsel at that time, but the *Henry* decision shows that this is not essential to the application of the Sixth Amendment guarantee of right to counsel.

The petitioner's conversation here, which was surreptitiously overheard, was with a police officer—as in *Spano*. Here, as in *Spano,* that officer was not the officer in charge of the case, and he was a long-time friend. As the trial judge found (Pet. 13a), Chief Pierce said to the petitioner: "I have known you all my life"; and he repeated this statement. The whole account shows that Chief Pierce was acting as a friend at a time of crisis in the petitioner's life. And neither the petitioner nor Chief Pierce was aware that their conversation was being surreptitiously overheard by the police officers at the desk.

There is much in *Henry* which fits into this picture. Thus, the Court said in *Henry* (slip op., p. 5);

> The present case involves incriminating statements made by the accused to an undisclosed and undercover government informant while in custody and after indictment.

Here the accused was in custody, though not yet indicted. His statements were surreptitiously made known to undisclosed police officers, and it is this undisclosed electronic disclosure which made the information available to the police, not anything said by Chief Pierce. In *Henry,* as in *Massiah,* the police officers obtained and utilized information from the petitioner without his knowledge that his words were being communicated to them as he spoke.

Here the "listening post" was "an inanimate electronic device" (*Henry,* slip. op., p. 7, fn. 9), but the presence of Chief Pierce, though he was unaware of

the electronic surveillance, did provide "capability of leading the conversation into any particular subject or building any particular replies." Here, "the government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements" (*Henry*, slip op., p. 8), though subtly and by indirection, by listening in on the conversation between Pierce and Look. In *Henry*, it was "undisputed that Henry was unaware of Nichols' role as a government informant." (Slip op., p. 8.) In the present case, it is undisputed that both Pierce and Look were unaware that their conversation was being overheard, and that they were providing information to the police officers.

Look knew that he was speaking to a police officer, and he took his chances on that; but he did not know that what he was saying was being heard by the officers at the desk. As the Court said in *Henry*, "Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be government agents." (*Henry*, slip op., p. 9.) In *Henry*, this Court said (slip op., p. 9): "Henry, being unaware that Nichols was a government agent expressly commissioned to secure evidence *cannot be held to have waived his right to the assistance of counsel.*" (Emphasis added.) Here, Look was unaware that his conversation with Pierce was being electronically communicated to the police officers at the desk. In this situation, he cannot be held to have waived his right to the assistance of counsel.

Finally, as in *Henry*, Look's "incarceration at the time he was engaged in conversation," with Pierce "is also a relevant factor." (Slip op., p. 9.) In *Henry*, this Court referred to the passage in *Miranda* which deals with "the powerful psychological inducement to reach for aid when a person is in confinement." (Slip

op., p. 10.) Here, Look was in custody and he was clearly particularly susceptible to the invasion of his privacy through the undisclosed electronic device. As this Court said in *Henry* (slip op., p. 10): "By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel."

The Brief in Opposition (p. 25) could be read to suggest that petitioner was advised of his rights under *Miranda* v. *Arizona,* 384 U.S. 436, during his conversation with Mr. Pierce. That is not so. Petitioner was advised of his *Miranda* rights while at the hospital (Tr. vol. 3, p. 45), before he was moved to the Wareham Police Station. Petitioner was not advised of his *Miranda* rights during the approximately two and three-quarters hours he spent in a separate room at the police station, the first hour of which was spent alone with Mr. Pierce. (R. 37-38; Tr. vol. 1, p. 51; vol. 3, pp. 44-76.) Thereafter, at approximately 2:40 a.m., the state police officers began their interrogation of the defendant and informed him of his *Miranda* rights at that time (R. 39). However, by that time, petitioner's conversation with Mr. Pierce had already been intercepted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

KENNETH J. AYRES
JONES, DAY, REAVIS & POGUE
1735 Eye Street, N.W.
Washington, D.C. 20006

ERWIN N. GRISWOLD
1735 Eye Street, N.W.
Washington, D.C. 20006
(202) 861-3898
Attorney for Petitioner

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